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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1986

ROBERT C. GUCCIONE,

Petitioner,

against

HUSTLER MAGAZINE, INC. and FLYNT DISTRIBUTING COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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December 31, 1986

Questions Presented.

1. Did the Court of Appeals unconstitutionally deprive petitioner of due process by extending the "libel-proof" doctrine in an unprecedented manner to hold petitioner "libel-proof" on the issue of adultery in the absence of any criminal conviction or reliable proof of petitioner's reputation for adultery, and even though the defamatory statement was found to have been published with actual malice?

2. In order to overturn the jury's finding of falsity, did the Court of Appeals usurp the jury's function by deciding as a matter of law that a false accusation of adultery made in the present tense must be read to mean only that the alleged adultery "existed simultaneously throughout an undefined span of time that included the period immediately prior to publication"?

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v.

HUSTLER MAGAZINE, INC. and FLYNT DISTRIBUTING COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

Petitioner Robert C. Guccione prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled action on August 29, 1986.

Opinions Below.

The opinions of the Court of Appeals for the Second Circuit, 800 F.2d 298, and of the District Court, 632 F. Sup. 313, appear in the Appendix.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on August 29, 1986. A timely petition for rehearing in banc was denied on October 8, 1986, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Constitutional Provisions Involved.

The First Amendment to the United States Constitution: "Congress shall make no law . . . abridging the freedom of speech or of the press . . ."

The Fifth Amendment to the United States Constitution: ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . ."

The Seventh Amendment to the United States Constitution: "In suits at common law . . . the right of trial by jury shall be preserved . . ."

Statement of the Case.

This is a libel action brought by petitioner, a New York citizen and the publisher of Penthouse, Omni and other magazines. Following the culmination of a decade of unprovoked, malicious attacks against him in the pages of the nationally-circulated Hustler Magazine, petitioner sued the publisher Hustler Magazine, Inc. ("Hustler") and the distributor Flynt Distributing Company, Inc. ("FDC"). Both respondents are California corporations, and jurisdiction was invoked on the basis of diversity of citizenship. 28 U.S.C. §1332.

The libel which is the subject of this case appeared in the November 1983 issue of Hustler Magazine and accused petitioner of committing adultery by the following statement: "Considering that he is married and also has a live-in girlfriend, Kathy Keeton. . . ." Petitioner had been living continuously with Kathy Keeton since 1966, after his wife abandoned him in 1964. He obtained a formal decree of divorce in 1979, and since that time respondents were fully aware of the fact that he was no longer married.

The case was tried before a jury in September-October, 1985, Hon. Robert W. Sweet presiding. The evidence at trial showed without contradiction that petitioner obtained a judicial decree of divorce from his wife on August 14, 1979 (four years before the defamatory article was published), and that respondents had actual knowledge of the divorce. In an earlier case against Hustler, petitioner testified at deposition on September 27, 1979 and at trial on February 21, 1980 that he was divorced in 1979.

Hustler had even taken the deposition of petitioner's ex-wife on December 18, 1980, wherein she testified that she was divorced from petitioner in August 1979. In court papers filed in 1980, Hustler's counsel specifically referred to her as petitioner's "former" wife. Hustler Magazine had a research department which regularly checks the facts of such articles, yet it made no investigation in this case (even though respondents were subjectively aware that they had to pay close attention to anything written about petitioner in light of past lawsuits brought by him).

Indisputably, Hustler had viciously defamed petitioner in its publication despite the fact that, as stipulated at trial, petitioner never provoked these incidents nor responded in kind except to sue for legal redress. Without

a substantial monetary award, petitioner has no way to deter the incessant flow of vile abuse and defamation about him in the pages of respondents' monthly publications.

The foregoing represents just part of the proof which led the jury to conclude, and the District Court to uphold, a finding that respondents acted with actual malice. The jury awarded petitioner $1 in compensatory damages and $900,000 in punitive damages against respondent Hustler and $700,000 in punitive damages against respondent FDC.

The Court of Appeals, however, did not address those issues. Instead, it reversed the jury verdict and the decision of the District Court on the dual grounds that the libelous statement was "substantially true" and that petitioner was "libel-proof" as to an accusation of adultery. The Court of Appeals revealed its disapproval of petitioner's controversial and unpopular profession by gratuitously and unjustifiably labeling him a "publisher of pornography," even though such an epithet finds no support in the record. In the process of fulfilling its determination to deny petitioner his jury verdict, the Court of Appeals eroded the fundamental right to trial by jury as well as due process of law by summarily dismissing the case.

REASONS FOR GRANTING THE WRIT.

I.

The decision below conflicts with decisions of other federal courts of appeals by unconstitutionally expanding the narrow ambit of the "libel-proof" doctrine.

By finding petitioner "libel-proof" from an accusation of adultery, the Court of Appeals for the Second Circuit

has drastically expanded the scope of the "libel-proof" doctrine beyond its original confines, and in so doing has created a direct conflict with the Courts of Appeals for the District of Columbia Circuit and Third Circuit. *See Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568-69 (D.C. Cir. 1984), *rev'd on other grounds*, 477 U.S. ____, 91 L.Ed.2d 202 (1986); *Marcone v. Penthouse International*, 754 F.2d 1072, 1079 (3rd Cir.), *cert. denied*, ____ U.S. ____, 88 L.Ed.2d 151 (1985).

It is particularly ironic that the Court of Appeals for the Second Circuit has now chosen to promulgate such a dramatic departure from existing law, inasmuch as the "libel-proof" doctrine was created by it as a "limited" and "narrow" concept.

The Second Circuit first announced the "libel-proof" principle in *Cardillo v. Doubleday & Co., Inc.*, 518 F.2d 638 (2d Cir. 1975), which was quickly followed by the caution in *Buckley v. Littell*, 539 F.2d 882, 889 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977), that the doctrine "is a limited, narrow one, which we leave confined to its basic factual context." The factual context of *Cardillo* was that the plaintiff there was "so unlikely by virtue of his life as a habitual criminal to be able to recover anything other than nominal damages as to warrant dismissal of the case, involving as it does First Amendment considerations." 518 F.2d at 639.

The genesis of the "libel-proof" doctrine has its roots in cases of habitual, convicted criminals, and courts have very carefully limited its application to that narrow factual context. See, e.g., *Ray v. Time, Inc.*, 452 F. Supp. 618 (W.D. Tenn. 1976), *aff'd*, 582 F.2d 1280 (6th Cir. 1978); *Logan v. District of Columbia*, 447 F. Supp. 1328 (D.D.C.

1978); *Bose Corp. v. Consumers Union*, 529 F. Supp. 357, 362 n.3 (D. Mass. 1981), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984).* The limited application of the "libel-proof" doctrine is further circumscribed by this Court's admonition against creating an " 'open season' for all who sought to defame persons convicted of a crime." *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 169 (1979).

In *Cardillo*, the Court of Appeals emphasized that the fundamental premise behind the creation of the "libel-proof" doctrine was constitutional concerns surrounding the dissemination of a newsworthy matter of legitimate public interest. After reviewing the record of Cardillo's numerous felony convictions and criminal associations together with the publisher's reliance upon public records and Cardillo's partner in crime who authored the book, the court was able to conclude with certainty that Cardillo could not recover anything beyond nominal damages—"we cannot envisage any jury awarding, or court sustaining, an award under any circumstances for more than a few cents' damages . . . ." 518 F.2d at 640.

Cardillo is very different from this case, not merely because Cardillo was a convicted felon and petitioner is not, but because *under any circumstances* Cardillo could not recover *anything* beyond nominal damages. The *Cardillo* analysis does not apply here because at trial petitioner demonstrated overwhelming evidence of actual malice sufficient to sustain a substantial punitive award

*While the "libel-proof" rule has been very rarely applied to situations not involving plaintiffs with criminal convictions, *e.g.*, *Simmons Ford, Inc. v. Consumers Union*, 576 F. Supp. 742 (S.D.N.Y. 1981), the theory in such cases was that other, unchallenged portions of the article already damaged plaintiff's reputation so that the "incremental" effect of the challenged portion could not sustain the lawsuit. That theory does not apply to the facts of this case (A. 38).

upheld in full by the trial judge. The panel did not address the malice or damages issues, and therefore it cannot be said under the facts of this case that no jury would award, nor any judge sustain, any damages beyond nominal damages. Both the jury and the trial court declared that $1.6 million in punitive damages were fully warranted.

The First Amendment does not protect the use of "calculated falsehood" or "the lie, knowingly and deliberately published," *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964), so that the malicious acts of the respondents placed them beyond the bounds of constitutional immunity. The important First Amendment considerations which influenced the creation and application of the "libel-proof" doctrine in *Cardillo* are absent here. Substantial punitive damages were amply justified in this case by the abundant proof of actual malice. The damages awarded were intended to serve the salutary functions of vindication and deterrence (A. 39-40).

In addition, the panel completely misconstrued the facts when it concluded that "undisputed evidence" showed that petitioner's adultery was notorious and publicized (A. 14-15). The panel claimed that three articles which allegedly "describe both Guccione's marital status and his contemporaneous relationship with Keeton" were improperly excluded from evidence.*

*It is fundamental, however, that reputation is not proven by the use of hearsay newspaper clippings, for "the only tendency of such proof is to show not that the plaintiff's reputation is bad, but it ought to be bad." *Sun Printing Publishing Ass'n v. Schenk*, 98 F. 925, 929 (2d Cir. 1900). Reputation instead must be proven only by the testimony of duly qualified witnesses. *Michelson v. United States*, 335 U.S. 469, 478 (1948); *Reynolds v. Pegler*, 273 F.2d 429, 435 (2d Cir.), *cert. denied*, 350 U.S. 846 (1955). No such evidence or testimony was even proffered here.

Even these articles dating back to 1972 and 1974 do not accuse or imply that petitioner was guilty of adultery. Moreover, there was absolutely no evidence of their circulation, and the mere existence of those stale articles falls far short of proving what petitioner's reputation was either in 1983 when the libel was published or a decade earlier. The record is devoid of any competent evidence of petitioner's *reputation* for adultery generally or in the community in which he lives, so that the "libel-proof" holding of the Court of Appeals is unsupported, unjustified and unconstitutional.

This Court has yet to hear a case in which the "libel-proof" doctrine was presented for consideration. Over a decade has passed since the doctrine was judicially created by the Second Circuit as a constitutional defense, yet its contours remain ill-defined. Note, *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909 (1985). In view of the conflict among the courts of appeals and the extreme consequences of dismissal when the doctrine is invoked, the time is ripe for this Court to provide required guidance as to the scope of the "libel-proof" doctrine and precisely what role it plays in the array of constitutional defenses properly available in a defamation case.

In the name of constitutional protection, the "libel-proof" doctrine has herein been improperly applied as a tool to deprive this plaintiff of his day in court, notwithstanding the proof of actual malice by clear and convincing evidence. Other than in the very limited context of convicted criminals, the "libel-proof" defense should not be routinely applied as a barrier to prevent a plaintiff from presenting his case to a jury. *Marcone v. Penthouse International*, 754 F.2d 1072, 1079 (3rd Cir.), *cert. denied*, ____ U.S. ____, 88 L.Ed.2d 151 (1985) ("Evidence of a tarnished reputation is admissible and should be considered

as a factor to mitigate the level of compensatory damages"). It is one thing to *argue* to a jury that a libel plaintiff deserves little or no damages because of a tarnished reputation (the approach followed by the Third Circuit), but quite another to *dismiss* his claim entirely, even though he has never been convicted of a crime (the novel approach established in this case by the Second Circuit).

Even in its limited form of barring defamation actions brought by convicted criminals, the "libel-proof" doctrine was nevertheless disapproved in *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *rev'd on other grounds*, 477 U.S. ____, 91 L.Ed.2d 202 (1986). Writing for the Court of Appeals for the District of Columbia Circuit, then Circuit Judge Scalia concluded that "no significant First Amendment values would be furthered" by the "libel-proof" doctrine, and rejected it outright as "sanctioning willful character-assassination" and a "fundamentally bad idea." 746 F.2d at 1568-69.

Moreover, application of the "libel-proof" doctrine in circumstances where actual malice exists squarely conflicts with the statement of this Court that the First Amendment does not protect the "calculated falsehood" or "the lie, knowingly and deliberately published." *Garrison v. Louisiana, supra*. Evaluating the balance between the rights of an individual to be free from defamatory attacks and any countervailing First Amendment considerations, this Court has concluded that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Id.* The Court of Appeals for the Second Circuit, however, has now expanded upon a limited doctrine which it judicially created (and which has been applied by the federal courts

as a matter of constitutional law),* and used it in a manner which as applied herein only serves to protect the calculated falsehood knowingly published.

The departure of the Second Circuit from the rulings of this Court, the conflict between the Second Circuit and the District of Columbia and Third Circuits, and the conflicting decisions now within the Second Circuit, make it appropriate for this Court to resolve as a matter of constitutional law the extent to which the "libel-proof" doctrine can be used to foreclose judicial redress to a plaintiff who has been defamed intentionally and maliciously.

II.

The decision below deprives petitioner of his right to a jury trial by usurping the jury's role in determining the plain meaning of the libelous words.

The Seventh Amendment guarantees every citizen the right to trial by jury as a fundamental guaranty to be jealously and scrupulously safeguarded. *Jacob v. New York City,* 315 U.S. 752, 752-53 (1942); *Lyon v. Mutual Benefit Health & Accident Ass'n.,* 305 U.S. 484, 492 (1938). Yet the Court of Appeals invaded the province of the jury by deciding that the present tense accusation that petitioner "is married and also has a live-in girlfriend" *must* be read *as a matter of law* "to mean only that the marriage and cohabitation existed simultaneously throughout an undefined span of time that included the period immediately prior to publication" (A. 10).

*The "libel-proof" doctrine was established as a matter of constitutional law: it was created by a federal court of appeals and has been applied almost exclusively by the federal courts; it finds no precedent in any body of state law.

Under the facts of this case (divorce in 1979, libel in 1983), the statement therefore had to encompass some undefined period of time of at least four years' duration.

But if that was the only problem with the decision below, the case would have been remanded for a new trial under instructions that the appellate court considered correct. Instead, the Court of Appeals held that the "substantial truth" defense was not for the jury to even consider in evaluating the effect of petitioner's prior relationship with Ms. Keeton before he obtained a final divorce in 1979, but *requires dismissal* of the action as a matter of law because petitioner technically lived in adultery "for thirteen of the preceding seventeen years" (A. 11). So the Court of Appeals held as a matter of law that the verb "is" *must* refer to a period of time spanning the preceding seventeen years. This flimsy and insupportable bit of sophistry is the indispensable foundation created to support the result the panel wished to achieve. However, it is at war with logic, grammar and justice.

Such a twisted interpretation of the English language may be welcomed by those philosophers and poets who view time as a single continuum,* but when engaged in by a court of law it plainly represents the blatant sacrifice of established principles of appellate review to the desire to reach a preordained result. The skewed semantics adopted by the Court of Appeals borrows the response of Humpty Dumpty to Alice in Lewis Carroll's *Through the Looking Glass:* "When I use a word . . . it means just what I choose it to mean . . ." By arrogating to itself the right to change the meaning of the verb "is" to "was" or "has been," the

*"Time present and time past
Are both perhaps present in time future,
And time future contained in time past."
Four Quartets. Burnt Norton, I, by T.S. Eliot.

Court of Appeals not only usurped the jury's function, but fulfilled the prophecy of George Orwell that imprecise language can corrupt thought and engender political decay.

If the Court of Appeals believed that it could impose its distorted grammatical version upon the libelous words by reason of the expansive review authorized in *Bose Corp. v. Consumers Union,* 466 U.S. 485 (1984), such a misreading of appellate authority goes far beyond the legitimate boundaries defined in *Bose,* which holds only that "[a]ppellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." As noted, the Court of Appeals never reached the issue of malice, of which there was ample evidence, but preferred instead to dipose of the case by the verbal legerdemain of holding that the verb "is" does not refer to the present only, but also encompasses some undefined span of time in the past as well. Any other view, says the Court of Appeals, "is not within the range of reasonable interpretations requiring the jury's resolution" (A. 10). In other words, according to the Court of Appeals, it is irrational to understand the word "is" as meaning "is."

The dire consequences of this undisciplined approach to the doctrine of "substantial truth" is to offer an open invitation to trial and appellate courts to substitute their individual interpretations, however twisted, in place of the determination by the jury. The Court of Appeals should have upheld the District Court's decision to allow the jury to decide the meaning of the libel, for the result reached here will only serve to infuse further chaos and confusion in the law of libel and the division of responsibility between judge and jury.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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December 31, 1986

APPENDIX.

Opinion of the Court of Appeals for the Second Circuit, Dated August 29, 1986.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1478—August Term 1985

Argued: June 26, 1986 Decided: August 29, 1986

Docket No. 86-7277

ROBERT C. GUCCIONE,

Plaintiff-Appellee,

—v.—

HUSTLER MAGAZINE, INC. and
FLYNT DISTRIBUTING COMPANY, INC.,

Defendants-Appellants.

Before:

NEWMAN, CARDAMONE, and PIERCE,
Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York (Robert W. Sweet, Judge) awarding plaintiff damages in a libel action.

Reversed.

ALAN L. ISAACMAN, Beverly Hills, Cal. (David O. Carson, Cooper Epstein & Hurewitz, Beverly Hills, Cal., Anderson Russell Kill & Olick, New York, N.Y., on the brief), *for defendant-appellant Hustler Magazine, Inc.*

JOHN H. GROSS, New York, N.Y. (Ann V. Kramer, Anderson Russell Kill & Olick, New York, N.Y., on the brief), *for defendant-appellant Flynt Distributing Company, Inc.*

NORMAN ROY GRUTMAN, New York, N.Y. (Jeffrey H. Daichman, Thomas V. Marino, Grutman Miller Greenspoon & Hendler, New York, N.Y., on the brief), *for plaintiff-appellee.*

JON O. NEWMAN, *Circuit Judge*:

Publishers of pornography are, not surprisingly, often criticized and scorned and, on occasion, may even be libeled. This libel action brought by Robert Guccione, the publisher of *Penthouse* magazine, is noteworthy because the alleged libel was authored not by a righteous crusader against smut but by Larry Flynt, the publisher of *Hustler* magazine. An article printed in *Hustler* in 1983 stated that Guccione "is married and also has a live-in girlfriend, Kathy Keeton." In what the District Court for the Southern District of New York (Robert J. Sweet, Judge) characterized as a "grudge match," Guccione sued for

libel. The undisputed facts disclosed at the trial revealed that Guccione had been notoriously living with Miss Keeton while still married to Muriel Guccione for thirteen of the seventeen years prior to the article's publication, though he and Mrs. Guccione were divorced four years before the article appeared. Guccione emerged from the fray with a judgment in his favor of $1 in nominal damages and $1.6 million in punitive damages.

We must be careful in cases such as this not to accord either the pornographer plaintiff or the pornographer defendant less protection than would be accorded libel litigants who publish more traditional works of literature or journalism. Bearing that point firmly in mind, we conclude, for reasons that follow, that Guccione's claim fails as a matter of law, both because the statement at issue was substantially true and because Guccione was "libel-proof" with respect to an accusation of adultery. We therefore reverse.

Background

In the "Bits & Pieces" section of its November 1983 issue, *Hustler* printed a half-page article by Flynt that commented on Guccione's practice of being photographed, fully clothed, with naked *Penthouse* models. The article, entitled "What a Ham!" and labeled "Editorial Opinion," was accompanied by a photo from the September 1983 issue of *Penthouse*, depicting a clothed Guccione with his arm around an unclothed model sitting on his knee. The article included the following sentence: "Considering he is married and also has a live-in girlfriend, Kathy Keeton . . . we wonder if he would let either of them pose nude with a man" (elipsis in original).

Guccione contends primarily that the quoted language falsely accuses him of committing adultery in 1983, when the article appeared. He also suggests that it falsely implies that he was then living with his wife and girlfriend simultaneously. It is undisputed that Robert and Muriel Guccione married in 1956, separated in 1964, and divorced in 1979; Guccione has not remarried. It is also undisputed that Guccione has cohabited with Kathy Keeton since 1966.

Guccione, who is a public figure, sued Hustler Magazine, Inc. ("HMI") and Flynt Distributing Company, Inc. ("FDC"), alleging defamation, invasion of privacy, and copyright infringement.[1] The privacy and copyright claims were dismissed and are not pursued on appeal. The defendants unsuccessfully sought summary judgment, alleging the absence of actual malice and the substantial truth of the publication.

At a boisterous trial that gave new meaning to the term "adversary proceeding," Guccione contended that the article was libelous per se because adultery is a crime in New York, N.Y. Penal Law § 255.17 (McKinney 1980), and that he was entitled to nominal damages even if he had not demonstrated injury to reputation. He further claimed that the defendants printed the libel with actual malice, that is, knowledge of its falsity or reckless disregard for whether it was true or not. In support of this claim, Guccione presented evidence that he had testified about his 1979 divorce at the televised Ohio trial of a previous libel suit against HMI, that Flynt attended much of the trial, and that in connection with that trial Muriel

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[1] Larry Flynt, the publisher of *Hustler*, was named in the complaint but was dismissed before trial for lack of personal jurisdiction in New York.

Guccione discussed the divorce during the course of a deposition attended by HMI's attorneys. Guccione also elicited testimony that Flynt and his business associates are self-professed "Guccione watchers" with excessive interest in the details of the *Penthouse* publisher's private life. Finally, Guccione offered excerpts from other issues of *Hustler* to show that Flynt bore ill will toward Guccione. Guccione sought compensatory and punitive damages and, at the damages phase of the trial, offered into evidence the entire November 1983 issue of *Hustler.*

Throughout both the liability and damages phases of the bifurcated trial, Guccione's attorney, Norman Roy Grutman, whose melodramatic appeals to jurors' passions and prejudices have previously been criticized by this Court, *see Lerman v. Flynt Distributing Co.*, 745 F.2d 123, 141 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2114 (1985), demonstrated the inadequacy of our prior cautions. Grutman described Flynt as "the Son of Sam among publishers," a "Philistine Goliath" and "Quasimodo"; he called Flynt's and *Hustler*'s attacks on Guccione "torture" and "death by a thousand cuts"; he said those connected with the alleged libel were trying "to poke Mr. Guccione in the eye with a sharp stick, just as they have been doing for 10 years." At the close of his summation in the damages phase of trial, Grutman urged the jurors, "[i]n the name of the Almighty," to award Guccione large sums in compensatory and punitive damages.

The defense case was presented with equal vigor, though with less flamboyance. In addition to maintaining throughout that Guccione's adultery for thirteen years—from 1966, when he began living with Kathy Keeton, until he was divorced in 1979—made the printed statement

substantially true, HMI and FDC argued that the alleged libel was published without actual malice and that in any event Guccione could not recover because his reputation had not been damaged. To support the latter argument, the defendants elicited from Guccione testimony that he suffered no mental anguish since his parents, children, social friends, and business associates knew he had been living with Kathy Keeton while still married. In addition, the defendants introduced into evidence numerous issues of *Penthouse* and excerpts from other magazines published by Guccione containing articles describing or advocating extramarital sexual relations. The purpose of this evidence was presumably to demonstrate that Guccione views adultery as acceptable conduct. Indeed, he testified that in his opinion he was not committing adultery from 1966 to 1979 and that he sees no social stigma attached to adultery.

The defendants also attempted to show that Guccione's reputation for matters relating to his marriage and adultery is so bad that he is "libel-proof" with respect to the *Hustler* article. The defendants attempted to offer as evidence, in addition to the articles and excerpts mentioned above, several articles from major publications in which the fact of Guccione's marriage and his contemporaneous relationship with Kathy Keeton are described. The District Court refused to allow into evidence articles probative of Guccione's reputation prior to 1978 during either the liability or the damages phase of the trial.[2]

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2 The excluded articles were also relevant to the appellants' defense of lack of actual malice, since Flynt and other *Hustler* personnel claimed to have had no specific source for the allegation of adultery but to have read in various magazines that Guccione was living with Keeton while still married. Grutman repeatedly emphasized to the jury appellants' failure to substantiate their story with specific magazine articles, leaving the jury to assume that no such articles existed, when in fact he

At the end of the trial's liability phase, the jury concluded that the statement "Considering he is married and also has a live-in girlfriend, Kathy Keeton" constituted libel per se as defined by the District Court, was false, and was published and distributed with actual malice. At the damages phase, the jury found HMI and FDC liable to Guccione for one dollar nominal damages for injury to reputation, the minimum allowed by the Court, but gave no award for mental or emotional distress. In addition, the jury awarded Guccione punitive damages of $900,000 from HMI and $700,000 from FDC. The defendants then moved for judgment notwithstanding the verdict and for a new trial. The District Court denied these motions, 632 F. Supp. 313 (S.D.N.Y. 1986), and this appeal followed.

Discussion

On appeal, HMI and FDC raise a host of issues. They argue that the District Court misdefined libel per se and improperly allowed the jury to return a finding of liability without any proof of injury to reputation, that the published statement was substantially true as a matter of law and that the District Court's instruction erroneously eliminated the substantial truth defense, that Guccione is libel-proof as regards an accusation of adultery, that the record contains insufficient evidence to support the jury's finding of actual malice, that the punitive damages are excessive, that punitive damages in libel cases involving

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knew that the articles had been excluded by the District Court. Admission of the articles would not likely have changed the jury's ruling on actual malice, however, since the evidence suggesting that appellants knew of Guccione's divorce prior to publishing the alleged libel—testimony regarding the Ohio libel trial—related to appellants' knowledge as of 1981, whereas the excluded articles were published between 1972 and 1974.

public figure plaintiffs and media defendants are unconstitutional, that the jury verdicts on liability and damages were based on prejudicial evidence that should have been excluded by the District Court, and that misconduct by Grutman warrants a new trial. We consider only the substantial truth and libel-proof issues and conclude that on each ground summary judgment in HMI's and FDC's favor was required.[3]

Under New York law, which applies to this diversity suit, it is "fundamental that truth is an absolute, unqualified defense to a civil defamation action," *Commonwealth Motor Parts Ltd. v. Bank of Nova Scotia*, 44 A.D.2d 375, 378, 355 N.Y.S.2d 138, 141 (1st Dep't 1974) (citation omitted), *aff'd*, 37 N.Y.2d 824, 377 N.Y.S.2d 482 (1975), and "substantial truth" suffices to defeat a charge of libel, *Fairley v. Peekskill Star Corp.*, 83 A.D.2d 294, 297, 445 N.Y.S.2d 156, 159 (2d Dep't 1981). If the statement at issue in this case was substantially true, the claim of libel was legally insufficient and the complaint should have been dismissed, regardless of any impact the statement might have had on Guccione's reputation.

The burden of proving the falsity of the alleged libel rested with Guccione. *See Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 380, 397 N.Y.S.2d 943, 950, *cert. denied*, 434 U.S. 969 (1977). He maintains that because the statement was phrased in the present tense it accused him of committing adultery at the very time the statement was printed, that is, in late 1983, and that the fact of his 1979 divorce rendered the statement false.

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3 The Supreme Court has recently demonstrated its willingness to dispose of libel claims brought by public figure plaintiffs on summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986).

Guccione concedes that the substantial truth defense permits a certain amount of leeway as to accuracy. He argues, however, that whether the statement at issue was substantially true was a jury question resolved in his favor by a properly instructed jury. We disagree.

The District Court gave the following jury instruction on substantial truth:

> Guccione must . . . establish that the statement was false. If the statement is true or substantially true, it cannot be libelous. It's not necessary of course that a statement be literally true. The test is whether the statement, as it was published, had a different effect on the mind of the reader than the actual literal truth. The facts which are offered to support a claim of substantial truth must be as broad as the alleged libel. Therefore, you have to determine the scope of the alleged libel before you can determine whether or not the statement was substantially true.

632 F. Supp. at 322. To this point, the charge was unexceptional. Unfortunately, however, the next paragraph improperly permitted the jury to disregard the substantial truth defense. The trial judge continued:

> Put another way, if you determine that the libel in question should be read as accusing Guccione of committing adultery only in 1983, the fact that Guccione might have committed adultery at another time is not going to make the statement substantially true. However, if you determine that the libel should only be read as accusing Guccione more generally of being an adulterer, you can then consider the evidence of Guccione's prior actions in relation to this issue of substantial truth.

Id. at 623.

This portion of the instruction permitted the jury to read the alleged libel as accusing Guccione of committing adultery "only" in 1983, in which event the jury was not to consider whether his past adultery made the statement substantially true. Though such a consequence would follow from such a reading of the statement, that reading is not within the range of reasonable interpretations requiring the jury's resolution. The statement was not an allegation of a specific act, like robbing a bank, that might in some circumstances be fairly interpreted either to mean that the act was committed at a time immediately prior to the publication or to mean that commission occurred at some time considerably earlier. The statement about Guccione alleged ongoing relationships—marriage to his wife and cohabitation with his girlfriend. There is not the slightest indication from the statement, or from any evidence offered that might aid in interpreting the statement, that it may fairly be read to mean that the marriage and the cohabitation existed simultaneously *only* at a moment or brief interval just prior to the article's publication. The statement can be read to mean only that the marriage and the cohabitation existed simultaneously throughout an undefined span of time that included the period immediately prior to publication.

On this reading, the undisputed facts establish the defense of substantial truth as a matter of law. New York law recognizes that an alleged libel is not actionable if the published statement could have produced no worse an effect on the mind of a reader than the truth pertinent to the allegation. *See Fleckenstein v. Friedman*, 266 N.Y. 19, 23 (1934). The published statement read, "Considering he is married and also has a live-in girlfriend, Kathy Keeton

. . . we wonder if he would let either of them pose nude with a man." Substituting the truth for the false statement yields the following: "Considering that from 1966 to 1979 he was married and also had a live-in girlfriend, Kathy Keeton . . . we wonder if he would let either of them pose nude with a man." The only difference in effect between the two statements worked in Guccione's favor; as printed, the statement merely points out the fact of his adultery, without calling attention to its duration for thirteen of the preceding seventeen years.

This is not to suggest that every person guilty of even a single episode of marital infidelity has no recourse if, years after the fact, he is accused in print of currently committing adultery. However, the undisputed facts of this case—the extremely long duration of Guccione's adulterous conduct, which he made no attempt to conceal from the general public, and the relatively short period of time since his divorce—make it fair to say that calling Guccione an "adulterer" in 1983 was substantially true. Of course, "former long-time adulterer" would have been more precise. But on the facts of this case, to require such a level of accuracy is unreasonable. The article labels Guccione an adulterer. The average reader would understand that term to include a man who unabashedly committed adultery for thirteen of the last seventeen years and whose adulterous behavior ended only because his wife ultimately divorced him. Where, as here, "the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done." *Cafferty v. Southern Tier Publishing Co.*, 226 N.Y. 87, 92 (1919).

The undisputed facts also establish that Guccione's libel complaint fails because Guccione was "libel-proof" with respect to the accusation of adultery printed in the *Hustler* article. We have recognized that a plaintiff's reputation with respect to a specific subject may be so badly tarnished that he cannot be further injured by allegedly false statements on that subject. *See Cardillo v. Doubleday & Co., Inc.*, 518 F.2d 638, 639-40 (2d Cir. 1975). It has also been recognized that a plaintiff may have had his reputation so badly damaged by true statements in a particular publication that minor false accusations within the same publication cannot result in further meaningful injury. *See Simmons Ford, Inc. v. Consumers Union*, 516 F. Supp. 742 (S.D.N.Y. 1981) (Weinfeld, J.). The libel-proof plaintiff doctrine is to be applied with caution, *see Buckley v. Littell*, 539 F.2d 882, 889 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977), since few plaintiffs will have so bad a reputation that they are not entitled to obtain redress for defamatory statements, even if their damages cannot be quantified and they receive only nominal damages. But in those instances where an allegedly libelous statement cannot realistically cause impairment of reputation because the person's reputation is already so low or because the true portions of a statement have such damaging effects, even nominal damages are not to be awarded. Instead, the claim should be dismissed so that the costs of defending against the claim of libel, which can themselves impair vigorous freedom of expression, will be avoided. *See generally* Note, *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909 (1985).

Guccione argues that the libel-proof plaintiff doctrine may not be applied to him with respect to the subject of adultery because he has not been convicted of the crime

of adultery. Though criminal convictions were the principal basis for the low reputation of the libel-proof plaintiff in *Cardillo*, the doctrine is not limited to plaintiffs with criminal records. *See Simmons Ford, Inc. v. Consumers Union, supra.*

In *Wynberg v. National Enquirer, Inc.*, 564 F. Supp. 924, 928-29 (C.D. Cal. 1982), the Court recognized that a plaintiff may be rendered libel-proof by evidence apart from criminal convictions. In *Wynberg*, the *National Enquirer* published an article stating that the plaintiff had used his relationship with Elizabeth Taylor for financial gain. In finding Wynberg libel-proof, the District Court first noted the plaintiff's string of convictions for crimes that damaged his reputation for his treatment of women in general. The Court then relied equally, however, on Wynberg's "specific reputation for taking financial advantage of Elizabeth Taylor," citing numerous articles, printed prior to the *National Enquirer* piece, that ascribed to Wynberg a profit motive in his relationship with Taylor. *Id.* No criminal convictions related to Wynberg's dealings with Taylor. The non-criminal evidence was perhaps the more appropriate basis for the determination that Wynberg was libel-proof, since it showed that his reputation was already severely damaged with respect to the precise point of the alleged libel.

In the present case, the District Court based its ruling that Guccione was not libel-proof on the absence of criminal convictions and the lack of publicity regarding Guccione's adultery. 632 F. Supp. at 323-24. We have rejected the first basis and also conclude that undisputed evidence sufficiently established that Guccione's reputation regarding adultery rendered him libel-proof on this subject. Guccione testified that from 1966 until 1979 his

relatives, friends, and business associates knew that he was living with Keeton while still legally married. He acknowledged that he never hid either his marriage or his relationship with Keeton from anyone. Guccione on several occasions told reporters both that he was separated from his wife and that he was living with Kathy Keeton.

Defendants offered magazine and newspaper articles as evidence of Guccione's poor reputation on the subject of adultery. These articles, which describe both Guccione's marital status and his contemporaneous relationship with Keeton, appeared in widely circulated publications such as *Newsweek*, *New York* magazine, and the *Washington Post*. With one exception, a 1978 article in *Maclean's*, a Canadian magazine, the District Court excluded this evidence, apparently because it viewed the publications, printed in the early-to mid-1970's, as being too remote in time to be relevant to the state of Guccione's reputation in 1983.

In our view, this evidence, the authenticity of which is undisputed, was improperly excluded. The articles were extremely probative of Guccione's notoriety for adultery during the period when his adultery was most newsworthy—while it was occurring. The articles, in combination with Guccione's testimony, show wide dissemination of the information that Guccione was living with Keeton while still married. The damage to Guccione's reputation occurred a decade before *Hustler* published its November 1983 article and stemmed from truthful reporting of facts freely admitted by Guccione himself. Any subsequent reporting accusing Guccione of adultery prior to his 1979 divorce could not further injure his reputation on the subject.

Nor is it tenable to maintain that Guccione, though libel-proof as to adultery from 1966 to 1979, somehow succeeded in restoring his reputation during the four years prior to the *Hustler* statement. As with the defense of substantial truth, the pertinent circumstances are the long duration of a widely known adulterous relationship combined with the relatively short period between its end and the article's publication. Moreover, the evidence provided no adequate basis for concluding that those who knew of the adulterous relationship from 1966 to 1979 became aware that the divorce occurred in 1979, thereby ending the adultery. Guccione's reputation for adultery could not have been further damaged by the publication of the alleged libel in 1983.

Conclusion

Both the substantial truth of the alleged libel and Guccione's libel-proof status as to adultery in 1983 provided independent bases for granting summary judgment to HMI and FDC. The judgment of the District Court is reversed.

Order of the Court of Appeals for the Second Circuit, Dated October 8, 1986, Denying Petition for Rehearing in Banc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 8th day of October one thousand nine hundred and eighty-six.

ROBERT C. GUCCIONE,

Plaintiff-Appellee,

v.

HUSTLER MAGAZINE, INC. and FLYNT DISTRIBUTING COMPANY, INC.,

Defendants-Appellants.

No. 86-7277

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee, Robert C. Guccione,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is Denied.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH,
Clerk

Opinion and Order of the United States District Court for the Southern District of New York, Dated March 19, 1986, Denying Post-Trial Motions.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ROBERT C. GUCCIONE,

Plaintiff,

against

HUSTLER MAGAZINE, INC. and FLYNT DISTRIBUTING COMPANY, INC.,

Defendants.

83 Civ. 8020 (RWS)

Appearances:

Grutman Miller Greenspoon Hendler & Levin, Esqs., Attorneys for Plaintiff, Robert C. Guccione, 505 Park Avenue, New York, New York 10022 By: Norman Roy Grutman, Esq., Jeffrey H. Daichman, Esq., Thomas V. Marino, Esq. *Of Counsel.*

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SWEET, D.J.:

Defendants Hustler Magazine, Inc. ("HMI") and Flynt Distributing Company, Inc. ("FDC") have brought a motion, pursuant to Rules 50(b) and 59(b), Fed.R.Civ.P., for judgment notwithstanding the verdict, or, in the alternative, for a new trial. Judgment was entered on October 17, 1985 following the bifurcated trial of this libel action brought by Robert Guccione ("Guccione"), among other things, the publisher of Penthouse, Inc. The jury awarded Guccione $1.00 in compensatory damages and a total of $1.6 million in punitive damages of which $900,000 was assessed against HMI and $600,000 against FDC. For the reasons set forth below, the defendants' motions will be denied.

I. *Framework of the Litigation*

This diversity action was initially brought by Guccione and Penthouse, Inc., alleging defamation, invasion of privacy and copyright infringement for the publication of a photograph and article in the November, 1983 issue of *Hustler* magazine, a national magazine with an avid readership. The defendants named in the complaint were Larry Flynt ("Flynt"), HMI and FDC. This action is one of several actions filed by Guccione in response to unfavorable publications which have appeared in *Hustler,* the most significant action being a libel suit in Ohio in

which a jury verdict was rendered against Flynt and HMI in the amount of $40 million. This verdict was affirmed with respect to the liability of Flynt and HMI while reversed as to the damages.

The course of the instant litigation has been mapped by the earlier opinions dated April 17, 1984, June 1, 1984, February 1, 1985, August 16, 1985, and September 17, 1985. During this pretrial period, the complaint against Flynt was dismissed for lack of personal jurisdiction in New York and the causes of action for invasion of privacy and copyright infringement were dismissed. The defendants also sought to dismiss the libel claim in two motions for summary judgment in which they asserted the absence of actual malice and the substantial truth of the publication. The summary judgment motions, brought respectively at the inception and conclusion of discovery, were each denied.

The trial was conducted during two weeks in September, 1985 at which time further motions were asserted and briefed on a daily basis. As noted above, judgment was entered against the defendants for a total of $1.6 million in punitive damages. Following the trial, the parties have contested the execution of judgment, and execution has been stayed to permit the defendants to pursue post trial and appellate remedies upon the posting of a bond in the reduced amount of $400,000. According to the defendants, a greater bond would have destroyed their ability to continue operations. The amount of the bond has been the subject of continuing discovery. Finally, the defendants brought the present motions which were submitted after oral argument on November 22, 1985.

A considerable amount of time, energy, and money has been expended by counsel by both sides to bring this grudge match to this court. Their ingenuity and skill has required an equivalent effort by the court to obtain a

resolution. Contrary to some recent libel actions in this court, the issues presented are not of commanding public interest but rather highly personal.

II. *The Libelous Statement and Applicable Standards*

The short article in *Hustler* contained the following false statement which forms the basis for this libel action: "Considering he is married and has a live-in girlfriend, Kathy Keeton, . . . we wonder if he [Guccione] would let either of them pose nude with a man." This statement was false when published in November, 1983 since it is uncontested that Guccione obtained a divorce from his wife in 1979 and has not subsequently remarried.

A) Libel *Per Se*

As determined at trial, the above statement includes a specific accusation that Guccione was engaged in an adulterous relationship since the reference to a "live-in girlfriend" implies a sexual relationship outside of marriage. As such, the false statement lies within that category of libel *per se* as defined under New York law. Libel *per se* provides a unique right of action for those statements that "tend[] to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or include an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society." *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 379, 397 N.Y.S.2d 943, 366 N.E.2d 1299 (N.Y. 1977). Words that impute the commission of an indictable offense comprise one category of libel *per se* under New York law. *See Moore v. Francis*, 121 N.Y. 199, 202-03, 23 N.E. 1127 (N.Y. 1890); *Privitera v. Town of Phelps*, 79 A.D.2d 1, 435 N.Y.S.2d 402, 404 (N.Y.App.Div. 1981). Under New

York law, "[a] person is guilty of adultery when he engages in sexual intercourse with another person at a time when he has a living spouse . . . ." N.Y. Penal Law §255.17 (McKinney's 1967). As found by the court at trial, the statement charging that Guccione had a "live-in girlfriend" implies that he was engaged in sexual intercourse with someone other than his spouse and therefore the statement does charge the commission of a crime.

The defendants urge that, while adultery is an indictable crime, such an offense is so commonplace and so infrequently enforced that it should not be considered a crime for the purpose of libel law. This argument, however, finds no support from the applicable New York authorities. *See Matherson v. Marchello,* 100 A.D.2d 233, 473 N.Y.S.2d 998, 1004 (N.Y.App.Div. 1984); *Jordan v. Lewis,* 20 A.D.2d 773, 247 N.Y.S.2d 650, 651 (N.Y.App. Div. 1964); *Bergmann v. Jacobs,* 157 N.Y.S.2d 50, 51-52 (N.Y.Sup.Ct. 1956). These cases do not suggest that the crime of adultery is so insignificant that such an accusation fails to support an action for libel *per se.* Therefore, until either the courts or legislature of New York indicate otherwise, this court is bound to accept Guccione's complaint as an appropriate pleading under the doctrine of libel *per se.* The consequence of this holding, critical to this action, is that Guccione is not required to prove special damages, *i.e.* actual damage to his reputation, in order to maintain this action. *See Matherson, supra,* 473 N.Y.S.2d at 1000-01; *Wachs v. Winter,* 569 F.Supp. 1438, 1443 (E.D.N.Y. 1983). That is fortunate for Guccione who failed to establish any such damages.

B) Public Figures

As explained in the June 1, 1984 opinion, Guccione was found to be a public figure in his libel suit in Ohio and

therefore would be collaterally estopped from claiming otherwise here. Since he has also conceded that he is a public figure, there is no question that he must meet the stringent standard of proving actual malice to recover for the false statement. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

III. *Judicial Review of Actual Malice*

The First Amendment concerns present in this libel action alter the usual presumptions adopted when considering a motion for judgment notwithstanding the verdict. Just as an appellate court has an obligation to make an independent review of the trial record to ensure that there has been no unconstitutional intrusion on free expression, *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 510-11 (1984), so the trial court must reexamine the evidence when presented with a motion for judgment n.o.v. It is necessary therefore for "[j]udges, as expositors of the Constitution, [to] independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.' " *Id.* at 511; *see Mr. Chow of New York v. Ste. Jour Azur S.A.,* 759 F.2d 219, 230 (2d Cir. 1985).

A. *Evidence Admitted at Trial*

At trial Guccione presented evidence which tended to demonstrate both components of the actual malice standard: that the defendants actually knew that the statement was false and alternatively that the defendants published the statement in reckless disregard of its truth or falsity.

The evidence established that Flynt, the publisher of HMI, had created the article which contained the libelous statement. The article appeared in the "Bits and Pieces"

section of the magazine and by deposition testimony, Bruce Helford, the editor responsible for the "Bits and Pieces" section, testified that Flynt had given him the article at an editorial meeting with instructions to include it in the November, 1983 issue of *Hustler*. Flynt testified that he wrote all of the article with the exception of certain changes that were made by the editorial and legal department. The legal department personnel who reviewed the article included David Kahn ("Kahn"), general counsel for HMI and Neil Adelman ("Adelman"), assistant general counsel.

Helford testified that at the time when the article was first handed to him by Flynt, he was unsure whether it could be included in the November issue since that issue had already been laid out and prepared for publication. He stated that after being told by the production department that the article could be included, the preparation of the article was done in a "big rush" and was finished within one day. Helford and another editor, Richard Lewis, testified that HMI had a policy of verifying information published in the magazine and that they employed four people in the HMI research department who checked the accuracy of proposed articles. However, the article containing the false statement was never forwarded to the research department for verification.

Helford, while he prepared the article for proper publication format, did not have any imput with regard to the substance of the article. Helford did testify that he attended a meeting with Flynt and Kahn in which Kahn suggested alterations in the text. Both Kahn and Adelman testified that they reviewed the article and proposed changes in several sentences of the article.

There was no testimony to indicate that the single statement at issue in this case was ever discussed by Flynt, Kahn and Adelman in the course of revising the article. Thus, there was no direct testimony that these participants

considered the implications or veracity of the statement. On one intermediate draft of the article, the statement was underlined which indicates that it was reviewed by someone, however, there was no testimony which revealed any significance to the underlining.

Each of the three involved in the drafting—Flynt, Kahn and Adelman—asserted that they believed at the time they wrote the article that Guccione was married to Muriel Guccione and that he was living with Kathy Keeton, thus claiming a good faith belief in the statement. Flynt stated that he had read articles in magazines which stated that Guccione was married. He also testified that he was friends with Irwin Billman and Jim Goode, two former executives of Penthouse Magazine who were employees of Guccione. Flynt asserted that these men had informed him that Guccione was married and never told him about any divorce. According to Flynt's testimony, his discussions with Goode extended for about one week and during these conversations Goode informed him that Guccione was promiscuous. As explained by Lewis, an HMI editor, Flynt's discussions with Goode were undertaken in early 1983 pursuant to Flynt's desire to publish an investigative article examining Guccione's business and personal life. This proposal was apparently abandoned after Goode told Flynt that while willing to provide sources and information, he was not interested in writing the article.

Flynt's testimony setting forth the sources for his statement was undermined by inconsistent answers given in response to pretrial interrogatories. At that time, Flynt did not mention any of these particular sources but instead responded that the facts regarding Guccione's marital status and girlfriend were "common knowledge in the news magazine industry and most likely in the general public." Adelman and Kahn testified that their understanding of Guccione's marital status was based on unspecified discussions and articles. Kahn did testify that he had read an in-

terview given by Guccione in which he recalled that Guccione stated he had been living with Keeton for ten or fifteen years. Circumstantial evidence in support of the professed beliefs of Flynt, Kahn and Adelman was provided by the testimony of Guccione. He admitted that he had lived openly with Keeton since 1966, that he spoke to the press about his relationship, and therefore he considered that their relationship was known to the public.

On the other hand, circumstantial evidence was presented to demonstrate that Flynt, Kahn and Adelman were actually aware of Guccione's divorce from his wife in 1979 and therefore aware of the falsity of the statement. In 1980, a prior libel action brought by Guccione against Flynt was tried in Ohio State Court. During this trial, Guccione testified that he had obtained a divorce from his former wife Muriel Guccione. The Ohio proceedings were televised, and Flynt was present in Ohio during the trial. Although there was no direct testimony that Flynt saw Guccione's testimony, such an inference could fairly have been reached by the jury.

Following the trial in Ohio, the local counsel for Flynt and HMI took the deposition of Muriel Guccione on December 18, 1980. At this deposition she also stated at the beginning of her testimony that she was divorced from Guccione. There was no direct evidence that any of the defendants' attorneys who attended this deposition, including Duncan Darrow who has provided continuing outside counsel to HMI, communicated any knowledge about Guccione's divorce to Flynt, Adelman and Kahn. Nevertheless, the record of this proceeding, together with the rest of the Ohio trial record, was available in the HMI legal department headed by Adleman and Kahn. These men admitted that they had read parts of the trial record in preparation for the filing of appeals from the Ohio jury verdict against Flynt. Thus it would be possible to infer their actual knowledge of the testimony given by Guccione

and his former wife. This inference with regard to Adelman's state of mind is buttressed by his testimony that he had a strong interest in Guccione and generally was attentive to any information regarding Guccione's activities.

The evidence cited above was probative of whether or not the defendants actually knew of the falsity of their statement. There was additional evidence to support the jury verdict based on the other standard for actual malice, that of reckless disregard for the truth or falsity of the statement. Prior deposition testimony of Flynt and prior publications of HMI were admitted to demonstrate that the statement was published with reckless disregard.

The prior publications of HMI indicated the ill will between the parties. Over a nine year period, Flynt was responsible for several publications in *Hustler* which demonstrated his hostility towards Guccione. These publications included references to Guccione as having a sex change operation, having a venereal disease and engaging in homosexual acts. One of these publications was the subject of the libel suit in Ohio in which a verdict was rendered against Flynt and HMI. HMI also published derogatory depictions of Keeton during the time period of her relationship with Guccione.

In addition to the tangible evidence of Flynt's hostile publications directed against Guccione, there was additional evidence of Flynt's subjective disregard for the truth of statements published by him. In deposition testimony given in another case, but closely related to the time period in which the libelous statement was published, Flynt responded: "I don't care" and "I didn't care" when questioned about a publisher's rights to print false statements. In that deposition, which was read to the jury here, the following colloquy also occurred:

> Q: Do you think with respect to adults you can say anything you want about their private sexual activities, whether it's real or fancied or not?

A: Yes.

Q: No matter how horrible it may be to the average ordinary person?

A: Yes.

Q: And you think you can do that in a magazine and get away with it, don't you?

A: Yes.

These admissions by an agent of the defendants, together with the lack of any specific source for the article, the animosity towards Guccione, and the rush to print the article within one day, were together probative of whether the statement was published in reckless disregard of its truth or falsity.

B. *Admissibility of Evidence*

Defendants objected to the introduction of evidence of prior publications relating to Keeton and Guccione and to the use of prior deposition testimony of Flynt on cross-examination. Each of these objections is unfounded.

The previously published excerpts in HMI relating to Keeton were relevant to this litigation since they displayed the close attention and interest of HMI in the relationship between Guccione and Keeton, a relationship that was the subject of the libelous statement. Despite their offensive nature, the relevance of these excerpts was not outweighted by any prejudice. Indeed it was just the offensive nature of these publications which were similar to others, which gave rise to the implication of the defendant's motive to publish false statements.

In deposition testimony which was used to cross-examine Flynt, several statements were admitted that tended to demonstrate Flynt's own disregard for the truth or falsity of the material in his publications. Also admitted

was prior deposition testimony in which Flynt claimed to have bribed a judge. While the defendants object on the basis that Flynt was not competent during those depositions by virtue of a manic-depressive condition, no finding of incompetence was ever made by the courts in which that deposition testimony was originally proffered.

The prior deposition testimony was properly admitted both on the basis of attacking the credibility of the witness Flynt, Fed.R.Evid. § 608(b), and as a prior admission by a representative of a party opponent. Fed.R.Evid. § 801(d)(2)(D). The time period of the prior statements was closely related to publication at issue here. The content of the statements was relevant in casting doubt on the credibility of Flynt's assertions that the instant publication was made in good faith and more generally with regard to this particular executives' subjective intent with regard to publishing at that time period. Furthermore, these statements were made by Flynt within the scope of his authority as chief executive of both HMI and FDC and therefore are admissible as admissions by the defendants. *See Meschino v. International Telephone & Telegraph Corp.*, 563 F.Supp. 1066, 1072 (S.D.N.Y. 1983); *see also Astra Pharmaceutical Products, Inc. v. Occupational Safety and Health Review Comm'n.*, 681 F.2d 69, 73 n.8 (1st Cir. 1982); 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 801(d)(2)(D)[01] (1985).

C. *Sufficiency of the Evidence*

The evidence outlined above is sufficient to establish with convincing clarity that the defamatory statement was published by HMI and FDC with actual malice. A determination of actual malice requires the finding that the defendants published the statement either with actual knowledge of its falsity or in reckless disregard of its prob-

able falsity. *See New York Times Co. v. Sullivan, supra.*

While the defendants' subjective awareness of the truth or falsity is central to the question of actual malice, *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), a defendant may not foreclose a libel action merely by his repeated assertions that he believed the truth of his statements at the time of publication. This direct evidence may be rejected by the jury if there is adequate circumstantial evidence which indicates that the defendant may have known of the falsity of his statements. *See Herbert v. Lando*, 441 U.S. 153, 160 (1979) (proof of the necessary state of mind could be in the form of objective circumstances from which the ultimate fact could be inferred); *Bose Corp. v. Consumers Union of U.S., Inc.*, 692 F.2d 184, 196 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984) (subjective determination of whether defendant in fact entertained serious doubts as to the truth of statement may be proved by inference, as it would be rare for a defendant to admit such doubts). The evidence in this case involved just such a conflict between the direct and circumstantial evidence regarding the state of mind of defendants.

While the executive officers and editors of HMI and FDC firmly testified to their belief in the truth of the libelous statement, circumstantial evidence to the contrary has been stated to indicate their awareness of Guccione's affairs in general as well as access to the particular statements of his true marital status in the Ohio litigation and their expressed motivations. On the basis of this circumstantial evidence, the jury could have found that Flynt, Adelman or Kahn actually knew about Guccione's divorce.

The evidence of the defendants' recklessness is more direct and for that reason stronger. The evidence regarding Flynt's malicious ill-will towards Guccione was prop-

erly admitted as one facet of the circumstantial evidence against the defendants relevant to a finding of reckless disregard for the truth. While "neither negligence nor failure to investigate, on the one hand, nor ill-will, bias, spite nor prejudice, on the other, standing alone, [are] sufficient to establish either a knowledge of the falsity of, or a reckless disregard of, the truth or falsity of the materials used . . .[,] evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity." *Goldwater v. Ginzberg*, 414 F.2d 324, 342 (2d Cir. 1969).

Hostility, of course, is not itself a sufficient basis for establishing constitutional malice in a First Amendment case since such an inference might result in liability based on the stridency of the statements rather than the reckless absence of factual support. Thus, the Supreme Court has cautioned against any definition of actual malice which blurs the distinction between hostility and knowing or reckless falsity as to the publication at issue. *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970), and hopefully the proper instruction was provided to the jury on this issue. Nevertheless, this distinction does not make the evidence of prior HMI publications which demonstrate ill will irrelevant to the determination of actual malice. Under the case law of this Circuit, *see Goldwater, supra*, it is appropriate to consider hostility under certain circumstances as evidence of the defendants' motive to publish harmful statements without regard to their truth or falsity. The most recent case to confront the issue of ill will, while lacking precedential value, is also instructive. *See Tavoulareas v. Piro*, 759 F.2d 90, *vacated and rehearing en banc granted*, 763 F.2d 1481 (D.C.Cir. 1985).

The majority opinion in *Tavoulareas* concluded that the defendant's predetermined bias or ill will against the plaintiff should be considered appropriate evidence of a reckless disregard for the truth. The court recognized that while ill will does not constitute an element of actual malice, it is nevertheless relevant as tending to prove an element of the standards for constitutional malice. Even without embracing the entire reach of the majority's opinion, the evidence of ill will by those of HMI and FDC was appropriately admitted. Unlike that case, here there were no fine shadings of opinion to be considered, no need to characterize the publisher's policy of hard-hitting investigative journalism, nor to consider whether an ambitious young journalist may be more prone to false reporting. *See Tavoulareas, supra*, 759 F.2d at 117-21. Instead, the personal animus between Flynt and Guccione provides a direct motive to falsify which is not otherwise linked to any journalistic policy or practice. In fact, while vigorously objecting to the majority's characterization of the newspaper's policies and urging the complete exclusion of ill will as evidence in a libel suit, the dissent in *Tavoulareas* stated that on those occasions where it is appropriate to admit ill will, then a particular defendant's personal hostility towards the plaintiff may be admitted as evidence of his own reckless disregard for the truth. *See id.* at 156 (J. Wright, dissenting). This is such a case, if ever there was one.

In addition, there was no need to consider whether the defendants were permitted an appropriate range of editorial discretion, *see Time, Inc. v. Pape*, 401 U.S. 279, 286 (1970), since in this case, the false statement was not merely a false characterization resulting from editorial revisions but rather was simply a blatant misstatement. This case did not involve an ambiguous source for which an editorial misstatement would be an understandable mistake. *See Pape, supra*, 401 U.S. at 292; *Bartimo v.*

Horsemen's Benevolent and Protective Association, 771 F.2d 894, 900 (5th Cir. 1985). Thus, there was little risk that admitting evidence of ill will would prejudice First Amendment values.

Finally, the evidence presented regarding HMI's failure to engage in any confirmation or investigation of Guccione's marital status under the circumstances corroborated other evidence of the defendants' reckless disregard for the truth or falsity of the publication. Generally, of course, in the absence of any duty, the failure to investigate does not in itself establish bad faith. *St. Amant, supra*, 390 U.S. at 732-33. However, the lack of an investigation can cast doubt on a defendant's profession of good faith in light of the complete absence of a source for the information or the known unreliable nature of a source. *Id.* at 732, *see Pep v. Newsweek, Inc.*, 553 F. Supp. 1000, 1003 (S.D.N.Y. 1983). Here no specific source for the article was identified, and Flynt claimed to have written the article based on what he termed "common knowledge." The evidence regarding HMI's lack of investigation into the story was relevant, since there was no specified source of the information published. *See generally Kerwick v. Orange County Publications Division of Ottawy Newspapers, Inc.*, 53 N.Y.2d 625, 438 N.Y.S.2d 778, 420 N.E.2d 970 (1981); *Guam Federation of Teachers v. Ysrael*, 492 F.2d 438 (9th Cir. 1974). Furthermore, the article was in no way "hot news" for which there was an urgent need to publish without time for verification. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 157 (1967).

The present case is distinguished from the case law setting forth the elements of actual malice as a constitutional standard because of the unusual character of Flynt's recklessness and hostility towards Guccione. Due to evidence establishing that Flynt himself wrote the article with actual malice, the verdict is equally applicable to FDC in view of Flynt's relationship as the sole shareholder

and chief executive for the company. Since there was adequate evidence on which the jury could reasonably find actual malice with convincing clarity, the liability verdict will not be overturned.

IV. *Substantial Truth*

HMI and FDC further assert that the court's instructions on the issue of substantial truth were improper in view of Guccione's concession that he lived with Keeton in an adulterous relationship from 1966 to the present. Substantial truth is an affirmative defense provided by New York law which provides that the omission or misstatement of "relatively minor details in an otherwise basically accurate account is not actionable." *Rinaldi, supra*, 42 N.Y.2d at 383.

The doctrine of substantial truth was adequately reflected by the instructions submitted to the jury:

> Guccione must also establish that the statement was false. If the statement is true or substantially true, it cannot be libelous. It's not necessary of course that a statement be literally true. The test is whether the statement, as it was published, had a different effect on the mind of the reader than the actual literal truth. The facts which are offered to support a claim of substantial truth must be as broad as the alleged libel. Therefore, you have to determine the scope of the alleged libel before you can determine whether or not the statement was substantially true.
>
> Put another way, if you determine that the libel in question should be read as accusing Guccione of committing adultery only in 1983, the fact that Guccione might have committed adultery at another time is not going to make the statement

> substantially true. However, if you determine that the libel should only be read as accusing Guccione more generally of being an adulterer, you can then consider the evidence of Guccione's prior actions in relation to this issue of substantial truth.

(Tr. 1077-78). These instructions directed the jury to determine the scope of the alleged libelous statement and compare with the facts presented to determine whether the statement had a different effect on the mind of the reader than the actual literal truth. Thus the jury was squarely presented with the alternative of interpreting the defamatory statement as a general accusation of adultery or a specific accusation of committing adultery in 1983 at the time the statement was made. The opposing parties stressed each interpretation in their summations, and it was appropriately left for the jury whether the scope of the libelous statement was co-extensive with Guccione's previous adulterous relationship.

HMI and FDC, however, urge that the court erred by failing also to instruct the jury to compare the "gist" or "sting" of the libelous statement with that of a true statement. *See Westmoreland v. CBS*, No. 82 Civ. 7913 (S.D.N.Y. 1985). Such an instruction would have been inappropriate because the statement constituted libel *per se*. As noted above, this special category of libel under New York law is reserved for those statements which are presumed by law to expose a person to public contempt or ridicule. Since the doctrine of libel *per se* is applicable to this publication, it would have been inappropriate to instruct the jury to weigh the "sting" or "gist" of the statement in order to determine whether the defendants' liability had been established. The existence of "sting" or damage is a conclusive presumption under the libel *per se* doctrine, *see Davis v. Ross*, 107 F.R.D. 326, 330 n.4 (S.D.N.Y. 1985), and thus the law of New York does not

require proof of special damages in actions based on libel *per se*. *See, e.g., Matherson, supra*, 473 N.Y.S.2d at 998.

V. *Libel-proof Defendant*

HMI and FDC assert, relying on *Cardillo v. Doubleday & Co., Inc.*, 518 F.2d 638, 639-40 (2d Cir. 1975), that Guccione's extensive earlier relationship with Keeton while he was married renders him libel-proof for any statement that falsely accused him of adultery with Keeton after his divorce decree was obtained. In *Cardillo*, this Circuit held that where a libel plaintiff has an extensive public record of felony convictions as well as public associations with other perpetrators of crime, he should not be permitted to bring a libel action based on accusations of similar criminal activity that are allegedly inaccurate.

Since the *Cardillo* libel proof doctrine has been "confined to its basic factual context," *Buckley v. Littell*, 539 F.2d 882, 889 (2d Cir. 1976), it is significant to note the facts distinguishing that case from the present one. The public record of Cardillo's past reputation for criminal conduct was extensive. The Court noted that Cardillo had been convicted of numerous separate offenses in both federal and state courts, had been indicted on one of the offenses mentioned in the allegedly defamatory publication, and that his connections with organized crime were the subject of testimony before a congressional committee. *Id.* at 640. Similarly, in one of the few cases to follow *Cardillo's* holding, it was found that the plaintiff had been convicted on several separate occasions and that numerous previous articles had reported his disreputable conduct. *See Wynberg v. National Enquirer, Inc.*, 564 F. Supp. 924, 928-29 (C.D.Cal. 1982). By contrast, there has been no demonstration here that accusations regarding Guccione's participation in adultery were widely broadcast in any written or oral public communications, nor was the

adulterous relationship subject to any public criminal proceedings. Thus, the public reputation of Guccione was not exposed in the extensive manner as that of the plaintiffs in *Cardillo* and *Wynberg*. Obviously, the crimes involved were also of a different character. The temptation to apply a double standard to this case, however, must be avoided.

The court's indication in *Cardillo* that an action should not be permitted if a plaintiff will only recover nominal damages is difficult to reconcile in light of other rulings by the Circuit. An action for nominal damages cannot be casually discounted since it is accompanied by the vindication of a jury verdict. *See Buckley, supra*, 539 F.2d at 897; *Goldwater, supra*, 414 F.2d at 340; *Sharon v. Time*, 599 F. Supp. 538, 586 (S.D.N.Y. 1984). While settlement or retraction of mistaken publications are preferable in circumstances presenting nominal harm to the plaintiff, nevertheless, the judicial process remains open to resolve these disputes between recalcitrant parties. It is presumably for the purpose of clearing the public record that libel *per se* actions are permitted as a special category of tort under New York law. Therefore, the judgment will not be vacated on the grounds that Guccione, concededly no saint, is libel proof.

The defendants also seek to align this case within the rulings in this Circuit espousing the incremental or subsidiary harm variations of the libel proof doctrine. *See Herbert v. Lando*, No. 85-7014 (2d Cir. January 15, 1986); *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*, 516 F.Supp. 742 (S.D.N.Y. 1981).

In *Herbert*, the Court of Appeals reviewed eleven allegedly libelous statements and concluded that with regard to nine of these statements there was not sufficient evidence of actual malice. While the evidence of actual malice regarding the other two statements was sufficient to survive a motion for summary judgment, the Court also

directed the dismissal of the other two statements. The Court held that false statements "should not be actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary" to statements which were not made with actual malice. *Herbert*, *supra*, slip op. at 1018. Since the overall nonactionable charge in the article that plaintiff had lied about reporting war crimes, fully subsumed the actionable statements regarding this same issue, the Court concluded that a libel suit based on the subsidiary statements should be dismissed.

The *Simmons Ford* case involved an earlier application of this same principle. In that case, an article was published which severely criticized the performance and characteristics of an electric car. The article also falsely stated that the car was not in compliance with certain federal safety regulations. The libel action was dismissed on the basis that there was an ample basis to justify the broad conclusion asserted in the publication that the car was unacceptable and, therefore, the false statement could not have caused any incremental harm. Thus, this case stands for the proposition that when, within an otherwise nonactionable publication, the harm of a single statement is nominal or nonexistent, the statement should be dismissed as nonactionable.

The rulings in *Herbert* and *Simmons Ford* are inapplicable to the present case since there was no evidence from this publication regarding any prior publications of nonactionable charges of adultery against Guccione which would encompass the false statement at issue here. Moreover, while the *Simmons Ford* holding is premised on a finding of nominal damages, that holding does not control this action in which the false statement constituted libel *per se*. As discussed above, such actions may be maintained in spite of the nominal potential recovery.

VI. *Punitive Damages*

As mentioned above, the jury awarded the minimum $1.00 in actual damages, but in addition imposed $1.6 million in punitive damages against HMI and FDC. The defendants argue that these awards of $900,000 and $600,000 respectively are unsupportable as a matter of law. The standards for awarding punitive and compensatory damages for state tort claims are provided by state law, *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 49 n.5 (2d Cir. 1984), while the standard for evaluating the possible excessiveness of a federal jury verdict is governed by Rule 59, Fed.R.Civ.P. *See Brinks Inc. v. City of New York*, 546 F.Supp. 403, 414 (S.D.N.Y. 1982), *aff'd*, 717 F.2d 700 (2d Cir. 1983).

Under New York law, punitive damages need not be proportionally related to the actual harm suffered by the plaintiff. *Hartford Accident & Indemnity Co. v. Village of Hempstead*, 48 N.Y.2d 218, 422 N.Y.S.2d 47, 397 N.E.2d 737 (N.Y. 1979). *Reynolds v. Pegler*, 123 F.Supp. 36 (S.D.N.Y. 1954), *aff'd*, 223 F.2d 429 (2d Cir. 1955); *Toomey v. Farley*, 2 N.Y.2d 71, 156 N.Y.S.2d 840, 138 N.E.2d 221 (N.Y. 1956). Punitive damages are allowable in a libel suit to punish a defendant, to deter him from repeating the offense and to warn others against similar deleterious conduct. *Wachs v. Winter*, 569 F.Supp. 1438, 1445 (S.D.N.Y. 1983). The financial status is relevant to the determination of how great the damages need be in order to deter further conduct, *O'Donnell v. K-Mart Corp.*, 100 A.D.2d 488, 474 N.Y.S.2d 344 (N.Y.App.Div. 1984), and in general the award should bear some reasonable relationship to the injury inflicted and the *mala fides* of the defendant. *See Nellis v. Miller*, 477 N.Y.S.2d 72, 101 A.D.2d 1002 (N.Y.App.Div. 1984); *Ashare v. Mirkin, Barre, Saltzstein & Gordon, P.C.*, 435 N.Y.S.2d 438, 106 Misc.2d 866 (N.Y.Sup.Ct. 1980).

In reviewing a punitive award, this court must keep judgments within reasonable bounds and set aside those awards that shock the conscience of the court. *Aldrich v. Thomson McKinnon Securities, Inc.*, 756 F.2d 243 (2d Cir. 1985); *Lerman v. Flynt Distributing Co.*, 745 F.2d 123 (2d Cir. 1984). Courts have also demonstrated a hesitancy to uphold large punitive verdicts in libel actions in view of their potential chilling effect on free speech. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 72-77 (1971) (Harlan, J., dissenting); *Lerman, supra*, 745 F.2d at 141.

With due regard for these considerations, the present judgments of $900,000 and $600,000 do not shock the conscience of the court given the evidence presented and the exercise of free speech involved. Defendants have repeatedly focused on the disparity between the actual and punitive damages in this case but ignore another basis—the *mala fides* or common law malicious intent of the defendant—which is an appropriate guideline for the award of punitive damages. *See Nellis v. Miller, supra*, 477 N.Y.S.2d at 74. The evidence regarding Flynt's extensive campaign of derogatory commentary on Guccione, and his past reckless publications amply support the substantial jury verdict. This reckless disregard for the truth is an appropriate reason for punishment and exists independent of the actual damages incurred by the plaintiff. Punishing such conduct in this unique context does not pose a threat to First Amendment values. Further the present jury award is not comparable to the mega-verdicts so common condemned on judicial review. *See, e.g., Lerman, supra*, 745 F.2d at 141 (2d Cir. 1984) ($33 million jury verdict); *Pring v. Penthouse International, Inc.*, 695 F.2d 438 (10th Cir. 1982) ($25.025 million jury verdict).

Finally, the jury verdicts are reasonably related to the wealth of the defendants. Contemporaneous tax returns

demonstrated net incomes for HMI and FDC which were greater than $7 million and $8 million dollars respectively. The net worth of defendants in 1983 was also shown to be substantial. While the defendants argued that these figures were artificially inflated values, the returns provided an adequate basis for imposing the punishment determined by the jury.

VII. *Prejudicial Conduct of Counsel*

Defendants vehemently protest what they view as the prejudicial trial conduct of plaintiff's counsel. HMI and FDC request that both the liability and damages verdicts be set aside due to the prejudice resulting from statements made by opposing counsel.

The court is sensitive to the difficulties posed by the imposing and harsh style of plaintiff's counsel, made more strident by the absolute lack of cordiality between the parties and their frequent litigation. To correct the occasional excesses of counsel, the court cautioned against improper statements and instructed the jury to disregard incompetent or irrelevant evidence. The difficulty of attaining the proper decorum was of course also due to the often unprintable subject matter of this case.

While the relevance of the prior articles which HMI had published outweighed their prejudicial imput, they nevertheless introduced pictorial and descriptive accounts of homosexual acts, sexually transmitted diseases and other graphic sexual matters. Many of the harsh statements made by plaintiff's counsel derived directly from these exceedingly unpleasant factual circumstances of the case. Therefore, it cannot be said that counsel dealt "altogether too much into matters and considerations outside the record which were obviously intended to prejudice the [defendants] in the eyes of the jury. . . ." *Koufakis v. Carvel*, 425 F.2d 892, 904 (2d Cir. 1970).

Similarly, the references by Guccione's counsel to the testimony of defense witnesses seem when taken out of context to indicate misconduct. Yet the characterization of these witnesses as liars was issued only after counsel had referred to the circumstantial evidence supporting the characterization and not simply as a technique to instill prejudice. *Cf. Koufakis, supra,* 425 F.2d at 902-03 (counsel's excessive denigration of a missing witness for his failure to take the stand); *Draper v. Airco, Inc.*, 580 F.2d 91, 95 (3d Cir. 1978) (inappropriate and repeated references to defendant's wealth, plaintiff's children and other facts not in evidence). Guccione's counsel did press his case with inflamatory remarks, the most serious being his references to Flynt as the "Son of Sam among publishers" and the "Quasimodo of publishers." While these breaches were inexcusable, by the time summations were made, the jury was inured to the hyperbole and the atmosphere of hostility between former antagonists painfully sharpened by the provocative and perverse materials which were the subject of the trial—and invoked by both sides. The strong language paled by comparison to certain of the testimony. The jury was instructed appropriately that closing summaries and colloquy among counsel were not admissible evidence and that their deliberations must be impartial and without prejudice. The inflammatory language did not overbear their judgment given the totality of the trial. A new trial is not warranted.

Conclusion

Defendants' motion for judgment n.o.v. or in the alternative for a new trial is denied.

It Is So Ordered.

DATED: New York, N.Y.
March 19, 1986

ROBERT W. SWEET
U.S.D.J.

86 - 1098

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT C. GUCCIONE,

Petitioner,

against

HUSTLER MAGAZINE, INC. and FLYNT DISTRIBUTING COMPANY, INC.,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS HUSTLER MAGAZINE, INC. AND FLYNT DISTRIBUTING COMPANY, INC. IN OPPOSITION TO PETITION

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PRELIMINARY STATEMENT

Respondents Hustler Magazine, Inc. ("HMI") and Flynt Distributing Company, Inc., ("FDC")[1] submit this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The court below unanimously held that respondents were entitled to judgment as a matter of law on two independent grounds: (1) that the alleged libel, involving an accusation of adultery, was not actionable under the common law of the State of New York because it was substantially true in light of plaintiff's thirteen years as an open and admitted adulterer; and (2) plaintiff was libel-proof because of the

[1] HMI and FDC are ultimately owned by Larry C. Flynt. Mr. Flynt also owns LFP, Inc., a related corporation.

open and notorious quality of the adultery and its widespread publication.

There are no special or important reasons that warrant review of the decision below in this case which was termed a "grudge match" by the district court, centering as it did on the improbably defamatory accusation that Robert Guccione, publisher of *Penthouse* magazine, was an adulterer. Judge Newman's opinion for the Court of Appeals rested on both the settled state common law of substantial truth and an unexceptionable application of the libel-proof doctrine, which has been accepted by at least two courts of appeals and numerous district courts.[2] Even were this Court to review, as plaintiff urges, the libel-proof doctrine, the judgment below would necessarily remain undisturbed unless this Court were also disposed to pursue the unusual course of examining the Court of Appeals' application of New York's substantial truth defense to specific facts.

The admission by plaintiff of the truthfulness of previous published accounts of his adultery eliminates any basis for a claim of conflict among the circuits as to the applicability of the libel-proof doctrine. In *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568-69 at n. 6 (D.C. Cir. 1984), *rev'd on other grounds*, 106 S.Ct. 2505 (1986), the District of Columbia Circuit expressly limited its criticism of the libel-proof doctrine to instances where "*none* of the repulsive attributes [defendants] imputed to [plaintiff] have been established or conceded to be true." *Id.* Here, plaintiff admitted the truth of his adultery.

Finally, the Second Circuit's conclusion that the undisputed facts made out a defense of substantial truth is soundly based. In all events, that holding, turning as it does on an assessment of a unique set of facts, presents no issue of general importance.

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[2] In addition to the Second Circuit, the Third Circuit has impliedly endorsed the doctrine. *Marcone v. Penthouse International Ltd.*, 754 F.2d 1072 (3rd Cir.), *cert. denied*, 106 S. Ct. 182 (1985). In *Marcone*, the Third Circuit held the doctrine inapplicable to a plaintiff who had neither been convicted of a crime, admitted criminal conduct, nor had a poor reputation with respect to the specific accusation claimed to be libelous—drug trafficking. *Id.* at 1079.

COUNTERSTATEMENT OF THE ISSUES

The case presents the following issues:

1. Is application of the libel-proof doctrine proper where plaintiff claims to have been libelled by an accusation of adultery in 1983, but was an admitted and open adulterer for 13 of the 17 years before the publication of the alleged libel?

2. Was the statement "Considering he is married and also has a live-in girlfriend, Kathy Keeton . . ." substantially true as a matter of New York State common law where Guccione admitted the statement was true for 13 of the 17 years before publication and where Keeton continued to be his live-in girlfriend through trial?

STATEMENT OF THE CASE

The facts of this case, the identity of the parties and the proceedings below are summarized in the decision of the Court of Appeals. Respondents further note the following:

1. Guccione testified at trial as follows:

> Q. Now, between 1966 and 1979 you did not hide your relationship with Ms. Keeton from your children, correct?
>
> A. That is correct.
>
> Q. Your children knew you were still married, correct?
>
> * * *
>
> A. Yes.
>
> Q. You did not hide that fact from them, did you, sir?
>
> A. No.
>
> Q. Between 1966 and 1979, you did not hide your relationship with Ms. Keeton from your parents, correct?
>
> A. That is correct.
>
> Q. Your parents still knew you were married, correct?
>
> A. They knew I was technically married, yes.
>
> Q. And between 1966 and 1979 you did not hide your relationship with Ms. Keeton from your social friends, correct?
>
> A. That is correct.

Q. And your social friends knew you were still married, correct?

A. I don't know that.

Q. Did you try to hide it from your social friends?

A. No.

Q. From 1966 to 1979 you did not hide your relationship with Ms. Keeton from your business associates, correct?

A. That's correct.

Q. Nor did you hide the fact that you were married, correct?

A. Correct.

Q. From 1966 through 1979 it was widely reported that you and Ms. Keeton were still living together, correct?

A. It was reported; I don't know how widely reported it was.

Q. Was it widely reported, sir?

* * *

A. I don't know to what extent it was reported, but *certainly everyone knew about it*.

Q. And during that period you did not hide the fact that you were married, correct?

A. That is correct.[3]

2. Articles discussing Guccione's status as an adulterer appeared in *Newsweek*, *New York* magazine and the *Washington Post*.

3. A former "Penthouse Pet," Anneka DiLorenzo, testified that Guccione had a poor reputation for sexual chastity.

4. The jury awarded Guccione $1.00 in compensatory damages, the lowest amount permitted by the district court.

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[3] Joint Appendix on Appeal pp. 655-657 (emphasis added).

5. In deciding the appeal, the court below dealt with only two of the numerous issues presented by respondents in their appeal of the district court's judgment. Therefore, any reversal in this Court would require remand to the Second Circuit for review of the other issues presented by respondents' appeal.

ARGUMENT

I.

THE APPLICATION OF THE LIBEL-PROOF DOCTRINE IN THIS CASE IS UNEXCEPTIONABLE

Petitioner claims that the application of the libel-proof doctrine in this case is a radical expansion that deprives petitioner of unspecified constitutional rights. The expansion claimed is that the libel-proof doctrine has generally been confined to plaintiffs whose reputations have been tarnished by criminal convictions. While there was no criminal conviction here, it was unnecessary because petitioner conceded that he had engaged in the specific type of criminal conduct of which he claimed he was libelously accused. The admission served the same purpose a conviction would have. In any event, a criminal conviction is not necessary for application of the libel-proof doctrine. *See Herbert v. Lando,* 781 F.2d 298 (2d Cir.), *cert. denied,* 106 S. Ct. 2916 (1986); *Wynberg v. National Enquirer, Inc.*, 564 F. Supp. 924, 928 (C.D. Cal. 1982); *Simmons Ford, Inc. v. Consumers Union,* 516 F. Supp. 742 (S.D.N.Y. 1981) (per Weinfeld, J.).

The rationale in libel-proof cases where a conviction is present, is that a criminal conviction is highly significant in weighing a libel claim because of the high standard of proof required to win one and because convictions are often the subject of publicity. *Wynberg v. National Enquirer, Inc.*, 564 F. Supp. at 928. In this case, the widespread publicity about petitioner's marital status and relationship with Kathy Keeton was generated by petitioner's own public statements. In sum, petitioner's poor reputation on the subject

of adultery was of his own making and furnishes no basis for complaint.[4].

The libel-proof doctrine is a relatively recent one, first applied twelve years ago in *Cardillo v. Doubleday & Co., Inc.*, 518 F.2d 638, 639-40 (2d Cir. 1975), and has been discussed by only three courts of appeals and approximately a dozen district courts. The only controversy it has occasioned was in *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *rev'd on other grounds*, 106 S. Ct. 2505 (1986). In that case Justice (then Judge) Scalia questioned the fairness of applying the doctrine where it was not known whether the publicity which occasioned the plaintiff's poor reputation was accurate or not. *Liberty Lobby*, at 1568. Justice Scalia specifically distinguished cases, such as this one, where plaintiff has conceded the truth of the allegations which created his poor reputation. *Id.* at n.6. Thus, the claim that the instant case gives rise to a conflict among the circuits is groundless.[5]

Finally, petitioner complains that where there is evidence of actual malice, the libel-proof doctrine should not apply even if there is no likelihood of recovery for injury to reputation, on the theory that the court should permit recovery of nominal and punitive damages.[6] However, as this Court has written, the only valid state interest in libel law to weigh against the First Amendment is protection of reputation. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971); *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-49 (1974).[7] The only proper purpose of libel laws is not to punish

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[4] Petitioner also complains that reputation should not have been proven through publications about him. However, the reputations of public figures are largely based on the publications about them and, thus, such publications are admissible to prove reputation. *Guccione v. Hustler Magazine, Inc.*, 7 Med. L. Rptr. 2077, 2083 (Ohio Ct. App. 1981), *cert denied*, 459 U.S. 826 (1982).

[5] Because there was no dissent from the denial of rehearing *en banc*, petitioner's claim to a conflict *within* the Second Circuit is also groundless.

[6] This argument was not raised by petitioner on appeal. It was first raised on petition for rehearing *en banc*. Rehearing was denied.

[7] Respondents do not concede that there was a basis for a finding of actual malice in this case, an issue that the Court of Appeals found it unnecessary to reach.

libellors but to compensate victims who have suffered injuries to their reputations. Where there is no such injury, "the claim should be dismissed so that the costs of defending against the claim of libel, which can themselves impair vigorous freedom of expression, will be avoided." *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 303 (2d Cir. 1986).

II.

THE STATEMENT AT ISSUE WAS SUBSTANTIALLY TRUE WHICH CONSTITUTED A COMPLETE DEFENSE AS A MATTER OF STATE LAW

Petitioner also challenges the Court of Appeals' alternative and independent ground of decision--that the facts established the defense of substantial truth under applicable state law.

As set forth by the New York Court of Appeals over fifty years ago, the substantial truth defense is a simple one:

> A workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced.

Fleckenstein v. Friedman, 266 N.Y. 19, 193 N.E. 537 (1934).

In its opinion the Second Circuit merely compared the statement as published:

> "Considering he is married and also has a live-in girlfriend, Kathy Keeton . . . we wonder if he would let either of them pose nude with a man."

with the precise truth:

> Considering that from 1966 to 1979 he was married and also had a live-in girlfriend, Kathy Keeton . . . we wonder if he would let either of them pose nude with a man.

Guccione v. Hustler Magazine, Inc., 800 F.2d 298, 302 (2d Cir. 1986). The court concluded that the predictable effect of the truth on the mind of the reader was, in fact, more damaging than the effect of the published statement because the latter did not point out the extreme length of Guccione's adulterous conduct. *Id.*

To avoid this unassailable conclusion by Judge Newman, petitioner argues that there is a possible interpretation of the statement to which the substantial truth defense would not apply. He states that the statement could be read as if it alleged a specific act of adultery which was taking place at the moment of publication in November 1983. As the Court of Appeals pointed out, however, the statement "alleged ongoing relationships—marriage to his wife and cohabitation with his girlfriend," which could not "fairly be read to mean that the marriage and the cohabitation existed simultaneously *only* at a moment or brief interval just prior to the article's publication." *Id.* This determination as a matter of law was certainly within the court's power to make under both New York State and federal precedents. *Anderson v. Cramlet,* 789 F.2d 840, 841-46 (10th Cir. 1986); *Anderson v. Stanco Sports Library, Inc.*, 542 F.2d 638, 641 (4th Cir. 1976); *Cafferty v. Southern Tier Publishing Co.*, 226 N.Y. 87, 92-93, 123 N.E. 76 (1919); *Klein v. Prial,* 32 A.D. 2d 925, 302 N.Y.S. 2d 295, 296 (2d Dept. 1969), *aff'd,* 28 N.Y. 2d 506, 318 N.Y.S. 2d 946, 267 N.E. 2d 589 (1971). The only fair reading was that Guccione had engaged in adultery over an undefined period. This was, in fact, true and a complete defense to the libel under the applicable state law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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